No. 741

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

ELMER C. ADAMS, SR., and ADAMS DAIRY COMPANY,
ELMER C. ADAMS, JR., and ADAMS DAIRY, INC.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Petitioners,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Elmer C. Adams, Sr., and Adams Dairy Company, Elmer C. Adams, Jr., and Adams Dairy, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 24, 1961.

OPINIONS BELOW.

The opinion and order of the District Court dated March 27, 1961 (R. 58-71)[1], is unreported and is printed in Appendix C hereto, *infra*, pp. A4-A19. The opinion of the Circuit Court of Appeals, printed in Appendix C hereto, *infra*, pp. A22-A39, is reported in 296 F.2d 861.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 24, 1961. C.A. 23; p. A22, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

The respondent, Federal Trade Commission, instituted administrative subpoena enforcement proceedings in the United States District Court. Petitioners challenged the validity of the subpoenas sought to be enforced upon the ground that the several administrative complaints pursuant to which said subpoenas were issued did not constitute lawful notice upon which proceedings before the Federal Trade Commission might be predicated or process

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1. The Record herein, as prepared by the Clerk of the Court of Appeals, consists of the printed Record and Supplemental Record in the Court of Appeals, together with the Record of Proceedings in the Court of Appeals. Since the page numbering does not run consecutively, for the sake of clarity page references to the Record will be referred to as "R. ": page references to the Supplemental Record will be referred to as "S.R. "; and page references to the Record of Proceedings in the Court of Appeals will be referred to as "C.A. "

issued. The District Court held that it was without jurisdiction to determine the question of the sufficiency of the complaints upon which the process sought to be enforced was predicated. The Court of Appeals affirmed. C.A. 9, 22; Appendix C, *infra*, p. A30.

The sole question presented by this petition is whether the courts, in administrative subpoena enforcement proceedings instituted by the Federal Trade Commission, are vested with jurisdiction and authority to adjudicate the question as to the sufficiency of the complaints pursuant to which the subpoenas sought to be enforced were issued.

STATUTES INVOLVED.

The statutory provisions involved are Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. §49, and Section 6(c) of the Administrative Procedure Act, 60 Stat. 240(c), 5 U.S.C. §1005(c). They are printed in Appendix A, *infra*, pp. A1-A2.

STATEMENT.

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 52 Stat. 111, 15 U.S.C. §§ 41 *et seq.*) the Federal Trade Commission, on September 24, 1959, issued complaints as follows (R. 6-11): In Commission Docket No. 7596 against Adams Dairy Company, Adams Dairy, Inc. and The Kroger Company; in Commission Docket No. 7597 against Adams Dairy Company, Adams Dairy, Inc. and Safeway Stores, Inc.; and in Commission Docket No. 7598 against Adams Dairy Company, Adams Dairy, Inc. and The Great Atlantic and Pacific Tea Company, Inc. The complaints (R. 6-11) are similar, each alleging that petitioners, Adams Dairy Company and Adams Dairy, Inc.

and one of the grocery corporations, Kroger, Safeway or A & P, have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade.

On February 18, 1960 (R. 3), the hearing examiner assigned to conduct hearings, caused to be issued and served upon the petitioners herein, *subpoenas duces tecum* and *ad testificandum* in each of the administrative dockets (R. 12-18, 37-42). Petitioners filed motions to quash the subpoenas (R. 4), which motions were overruled by the hearing examiner (R. 4, 19-28), and the Commission denied an appeal from his ruling (R. 4, 29-31). Thereafter, on September 12, 1960 (R. 32), the hearing examiner was advised that petitioners, Elmer C. Adams, Sr., and Elmer C. Adams, Jr., would not comply with the subpoenas (R. 4, 32-35). On September 13, 1960, the Commission applied to the United States District Court for an order to compel attendance of witnesses and production of documents at times and places to be fixed by the hearing examiner (R. 1-5, 37). In their return to an order to show cause petitioners challenged the validity of the subpoenas upon the grounds that such subpoenas were not issued pursuant to lawful complaints; that the complaints were insufficient and did not inform the petitioners with reasonable definiteness of the acts and practices alleged to be in violation of law; that the complaints were vague, indefinite and replete with conclusions of law; and that the complaints did not constitute lawful notice upon which proceedings before the Federal Trade Commission might be predicated or process issued; and that the subpoenas issued pursuant to such invalid complaints were invalid (R. 45-48). On March 27, 1961, the United States District Court issued its order denying its jurisdiction to determine the sufficiency of the several complaints and held that such jurisdiction is vested

exclusively in the Court of Appeals (R. 66, p. A14, *infra*). Apparently as an after thought the District Court further stated that even assuming that the District Court did have jurisdiction to pass on the question of the sufficiency of the several complaints, it was of the opinion that the several complaints were adequate upon which to base the issuance of the subpoenas and to conduct the examinations incident to the investigation of the complaints against the parties (R. 66, p. A14, *infra*). The District Court did, however, place certain limitations upon the subpoenas (R. 67-71, pp. A14-A20, *infra*) and both the petitioners and the respondents appealed (R. 71, S.R. 14).

On November 24, 1961, the Court of Appeals entered judgment against petitioners on the ground that the District Court was without jurisdiction to determine the sufficiency of the several complaints (C.A. 9, 22, pp. A21, *infra*), and for the respondent in that it modified the restrictions which the District Court had placed on the subpoenas (C.A. 21-23, pp. A30-A41, *infra*). In arriving at its decision that the District Court lacked jurisdiction to determine the sufficiency of the complaints the Court of Appeals relied upon three basic propositions: *first*, that the Federal Trade Commission Act does not confer upon District Courts authority to adjudicate the sufficiency of complaints in administrative subpoena enforcement proceedings (C.A. 6, p. A27, *infra*); *second*, that a party must exhaust his administrative remedies before he can properly and successfully enlist the aid of the judiciary (C.A. 6-7, p. A27, *infra*), and *third*, that a party may not accomplish by indirection what he could not do by direct action (C.A. 7-8, p. A28, *infra*).

REASONS FOR GRANTING THE WRIT.

1. Petitioners believe that there is a direct conflict between the decision of the Court below and the controlling decision of this Court in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946).

This Court in *Oklahoma Press Pub. Co. v. Walling, supra*, recognized that the grant of authority to enforce administrative subpoenas conferred upon District Courts by Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49, does not impose upon such courts a mere ministerial duty but instead vests in said courts a "discretionary" power. This Court in its opinion stated, 327 U.S. at pp. 216-217:

> "* * * Nor is the judicial function either abused or abased, as has been suggested, by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide. * * * * [fn. 57]"

Cf. Mississippi Road Supply Company v. Walling, 136 F.2d 391 (5 Cir., 1943), *Chapman v. Maren Elwood College*, 225 F.2d 230 (9 Cir., 1959).

In the absence of a standard by which to measure the recognized power of the courts to prevent abuse of their process would be merely illusory. The standard by which the courts may measure the breadth of the administrative subpoenas and the relevancy of the material sought, of

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fn. 57: "The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word 'may,' rather than 'shall' * * * in authorizing the court to enforce the subpoena."

necessity must be the scope of the inquiry as set forth in the complaint. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322 (1957); *cf. Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F.2d 450 (6 Cir., 1941), *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605 (2 Cir., 1957), *Menzies* v. *Federal Trade Commission*, 242 F.2d 81 (4 Cir., 1957), *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920); *American Tobacco Co.* v. *Federal Trade Commission*, 9 F.2d 57 (2 Cir., 1925), aff'd 274 U.S. 543.

Thus while a court can determine whether a subpoena is too broad or calls for matters and things wholly irrelevant only by looking to the scope of the inquiry as set forth in the complaint how can this judicial function be carried out if the charges can not be ascertained with reasonable definiteness? The decision of the court below denying the right of the District Court in administrative enforcement proceedings to determine the sufficiency of the complaint makes enforcement automatic, in instances where the complaint is so vague and indefinite that it does not afford the parties or the courts notice of the charges with reasonable definiteness. Under such circumstances the court would become an automaton and would be required to "rubber-stamp" action of an administrative agency simply because the latter demands such action. Therefore it appears that the decision of the court below conflicts with the prior decision of this Court in *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, which decision clearly recognizes the

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2. In that case this Court ordered the reinstatement of the order of the District Court which latter order, as set forth in *Civil Aeronautics Board* v. *Hermann*, 237 F.2d 359, at p. 362 (9 Cir., 1956), read in part: "In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board,

authority of the District Courts to determine the relevancy of the material sought and the breadth of the demand.

The Congress by long established policy has consistently withheld powers of testimonial compulsion from administrative agencies. Instead of authorizing an administrative agency to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. It is well settled that when a petition for the enforcement of administrative subpoenas is filed in a federal court, it initiates a case or controversy under the constitution. *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 489 (1894). In enforcing administrative subpoenas the courts exercise judicial power. *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, and it would appear to be fundamental that all questions relating to the jurisdiction of the court are justiciable.

The court below further held that there existed no statutory provision authorizing the District Court, in administrative subpoena enforcement proceedings, to determine the sufficiency of the several complaints as a requisite to the exercise of its powers of enforcement. This holding of the court is in conflict with the decision of this Court in *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, which decision, as above noted, recognizes that the power of enforcement conferred by Section 9 of the Federal Trade Commission Act is "discretionary" and that the courts are authorized to pass upon the relevancy and materiality of materials sought. The court's recognized statutory power to pass upon the relevancy and materiality of the materials sought, when properly considered in light of the fact that a court can only perform such function by comparing the demands to the scope of the inquiry as set forth in the complaints, constitutes ample statutory authorization to test the sufficiency of the complaints.

2. The decision of the court below not only denies petitioners procedural due process guaranteed by the Fifth Amendment but also effectively denies petitioners the protection against "unreasonable" search and seizure secured by the Fourth Amendment.

The protection against "unreasonable" search and seizure afforded by the Fourth Amendment is not confined literally to searches and seizures as such, but extends to the orderly taking under compulsion of process. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651, 657 (1950). It has been established that the person to whom process has been addressed may challenge its legality before being compelled to respond thereto. *Bowles* v. *Beatrice Creamery*, 146 F.2d 744 (10 Cir., 1944), *cf. Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 195 (1946). A constructive "unreasonable search and seizure" in violation of the Fourth Amendment results when a person is ordered to produce documents irrelevant or immaterial to the purpose of the inquiry. *Hale* v. *Henkel*, 201 U.S. 43 (1906), *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, *Westside Ford* v. *United States*, 206 F.2d 627 (9 Cir., 1953). It has further been recognized that the "standards" of materiality and relevancy are far more rigid in a trial or adversary proceeding than in an *ex parte* inquiry to determine the existence of violations of a statute. *Hagen* v. *Porter*, 156 F.2d 362, 365 (9 Cir., 1946), certiorari denied 329 U.S. 729; *Westside Ford* v. *United States*, *supra*; *cf. Walling* v. *American Rolbal Corporation*, 135 F.2d 1003, (2 Cir., 1943). The "standard" in the instant case of necessity must be the scope of the inquiry as presented in the several complaints. Otherwise there would exist no reason for applying a different "standard" to *ex parte* inquiries to determine the existence of violations of statutes and adjudicative proceedings instituted by the filing of a complaint. It has been recognized that a search is "unreasonable" where the purpose, for

which the documents and things called for are requested can only be determined as the inquiry proceeds. *McMann v. Securities and Exchange Commission*, 87 F.2d 377 (2 Cir., 1937). If the courts in administrative subpoena enforcement proceedings are without jurisdiction to make any determination concerning the legal sufficiency of the complaints pursuant to which the subpoenas sought to be enforced were issued, a party proceeded against would be, in instances where the complaint is so vague and indefinite that it does not afford notice of the charges with reasonable definiteness, effectively denied the right to contest issues of relevancy and materiality, and their rights under the Fourth Amendment would be completely abrogated.

The lower court held that the petitioners could secure a judicial determination of the issue here presented only after final administrative action. It is well settled that a particular method of review does not under all circumstances foreclose resort to the general jurisdiction of the district courts, but only forecloses such resort where the particularized method of review is adequate for the protection of the rights asserted. *Deering Milliken, Inc., v. Johnston*, 295 F.2d 856, 864 (4 Cir., 1961).

It is, of course, perfectly obvious that the statutory right of review afforded by Section 5(c) of the Federal Trade Commission Act (72 Stat. 943; 15 U.S.C. 45(c)), after the completion of administrative proceedings, cannot secure to petitioners their rights to protection from an "unreasonable" search and seizure guaranteed by the Fourth Amendment and their rights to a hearing on their objections to the proposed search and seizure guaranteed by the Due Process clause of the Fifth Amendment.

The similarity between the charges contained in the several administrative complaints (R. 6-11, 38) and the acts denounced in Section 1 of the Sherman Antitrust Act

(26 Stat. 209, 15 U.S.C. §1, 50 Stat. 693), is striking. Ostensibly under the guise of Section 5 of the Federal Trade Commission Act (52 Stat. 111, 15 U.S.C. § 45) the Commission has attempted to charge and try petitioners on a conventional Sherman Act offense, or, at least, acts which the Commission has conceived to be contrary to the "spirit" of the Sherman Act. If petitioners are, in fact, being proceeded against for some supposed violation of the Sherman Act, they are entitled to be fully apprised of the nature of such supposed violations and the complaint should identify the same with reasonable definiteness as required under the Sherman Act. Otherwise the Commission would, under the guise of Section 5 of the Federal Trade Commission Act, be assuming jurisdiction over hybrid offenses in proceedings that would not enable petitioners to contest the issue whether the Commission is staying within the metes and bounds of the applicable statute.

It has consistently been held in judicial proceedings that mere allegations of conclusions of law are not sufficient to state a claim for relief for which relief may be granted under Section 1 of the Sherman Act. *Louisiana Farmers' Protective Union, Inc., v. Great Atlantic & Pacific Tea Co. of America, Inc.*, 131 F.2d 419 (8 Cir., 1942); *Nelson Radio & Supply Co., Inc., v. Motorola, Inc.*, 200 F.2d 911, (5 Cir., 1952); *Alexander Milburn Co. v. Union Carbide & Carbon Corporation*, 15 F.2d 678 (4 Cir., 1926); *Baum & Blank, Inc., v. Admiral Corporation*, 132 F. Supp. 412 (S.D.N.Y. 1955).

Both the Administrative Procedure Act and the Rules of the Federal Trade Commission require that a complaint contain a statement of facts sufficiently full and definite to enable parties proceeded against to know the charges against them and prepare their defense. Section 5(a) of the Administrative Procedure Act (60 Stat.

239, 5 U.S.C. § 1004(a)(1) provides that parties entitled to notice shall be timely informed of "the matters of fact and law asserted." This statutory provision is implemented by the Federal Trade Commission's own Rule 4.4 (16 C.F.R. § 4.4) which provides that a complaint in adjudicative proceedings shall set forth "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the kind of acts or practices alleged to be in violation of the law."

Petitioners sought particularization of the several complaints herein involved but this was denied. Unlike judicial proceedings petitioners have no recourse to discovery as provided in the Federal Rules of Civil Procedure to obtain clarification and particularization of the complaints.

The complaints herein (R. 6-11, 38) cannot possibly be considered as being clear and concise factual statements sufficient to inform petitioners with reasonable definiteness of the acts complained of, and therefore do not perform the minimal function of serving notice with reasonable definiteness of the charges and the precise statutory provisions to which they relate. It has long been recognized that the complaint is the basis for all subsequent proceedings and if it is clearly insufficient any order or process founded thereon is invalid and must be set aside by the courts. *American Tobacco Co. v. Federal Trade Commission*, 9 F.2d 570 (2 Cir. 1925), aff'd 274 U.S. 543, *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427 (1920).

The failure of the respondent to observe the requirements laid down by the courts in Sherman Act cases and the statutes and rules specifically governing the requirements for complaints issued by the Federal Trade Commission will result in a deprivation of petitioners' constitutional rights if petitioners are compelled to obey subpoenas is-

sued pursuant to the complaints here involved. A party is entitled to a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan v. United States*, 304 U.S. 1, at p. 18 (1938).

3. The court below in reaching its decision has misconstrued and misapplied prior opinions of this Court in *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938), *Newport News Shipbuilding and Drydock Co. v. Schauffler*, 303 U.S. 54 (1938), as well as the case of *Perkins v. Endicott Johnson Corporation*, 128 F. 2d 208 (2 Cir., 1942), aff'd 317 U.S. 501.

The foregoing opinions of the Supreme Court are cited in support of the proposition "that parties must exhaust their administrative remedies before they can properly and successfully enlist the aid of the courts." Appendix C, p. A23, *infra*.

Each of those cases involved an attempt to secure, prior to final disposition of proceedings by the administrative agency, a judicial determination of the issue of "coverage" under the acts in question. This Court held that the exclusive primary jurisdiction to determine the issue of "coverage" (which issue of necessity involved intricate fact questions), has been vested by the Congress in the administrative agency. The distinction between the doctrine of "primary jurisdiction" and the rule requiring the exhaustion of administrative remedies was clearly pointed out in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 63 (1956), where the court stated:

> "'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever

enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Petitioners respectfully submit that no question of primary (exclusive) jurisdiction is presented in the instant proceeding, and that therefore the foregoing opinions of the Supreme Court have been misconstrued and misapplied by the court below. Certainly the duty of the courts to exercise judicial discretion in enforcing a subpoena is not to be determined in the first instance by the administrative agency. Petitioners have not challenged the jurisdiction of the Federal Trade Commission to conduct an investigation pursuant to a complaint duly filed, or to issue administrative subpoenas, nor have petitioners asked the courts to substitute their own for the administrative fact-finding. The validity of the complaints is a question of law which can only be determined by the courts. The determination of this issue does not involve fact-finding. The Congress has never attempted to vest jurisdiction to determine such an issue, either in the first instance or otherwise, in administrative agencies. Thus, since the Federal Trade Commission is not authorized or empowered to pass upon the issue presented in the instant matter, the doctrine of "exhaustion" of administrative remedies has no application and the doctrine of "primary jurisdiction" promulgated by this Court in the above cases, and as applied by the court below, is inapposite. On the other hand it has consistently been recognized that where the determination of a question does not involve the finding of facts the courts may pass on it as an issue solely of law and need not defer to the administrative agency. *Great Northern Ry.*

Co. v. *Merchants' Elevator Co., supra; United States* v. *Western Pacific Railroad Co., supra.*

By way of further distinction *Myers* v. *Bethlehem Ship Building Corporation, supra,* and *Newport News Ship Building & Dry Dock Co.* v. *Schauffler, supra,* involved direct proceedings instituted to enjoin further administrative proceedings. Petitioners herein have not sought to invoke the court's jurisdiction in a suit to enjoin. On the contrary the respondent, Federal Trade Commission, originally invoked the jurisdiction of the Court by the institution of subpoena enforcement proceedings.

4. Clearly the question as to the jurisdiction and authority of the courts in administrative subpoena enforcement proceedings to pass upon the sufficiency of the complaint pursuant to which the subpoena sought to be enforced was issued is of public importance since it involves the proper functioning of the federal judiciary in the field of federal jurisdiction, practice, and procedure, as well as the proper administration of the Federal Trade Commission Act. Furthermore a very important question is raised as to whether the decision below denies petitioners protection of constitutional rights guaranteed by the Fourth and Fifth Amendments. An early and definitive ruling on the questions presented is plainly in the public interest.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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February , 1962.

APPENDIX A.

Statutes.

Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C. 49) in so far as relevant provides:

* * *

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * *

Section 6 of the Administrative Procedure Act (60 Stat. 240, 5 U.S.C. 1005 (c)) in so far as it is relevant provides:

* * *

(c) Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or

showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

APPENDIX B.

Rules of Practice of the Federal Trade Commission.

§4.4 Complaint.—(a) Form. The Commissioner's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint;

(4) Notice of the time and place for hearing, the time to be at least thirty days after service of the complaint.

(b) Motion for more definite statement. If the statement in a complaint is so vague or ambiguous that a party cannot reasonably frame a responsive answer, the respondent may move for a more definite statement before filing its answer. Such a motion shall be filed within fifteen days after service of the complaint and shall point out the defects complained of and the details desired.

APPENDIX C.

Opinions Below.

IN THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

FEDERAL TRADE COMMISSION, Petitioner,
vs.
ELMER C. ADAMS, SR., and ADAMS DAIRY COMPANY, Respondents. — No. 12977.

FEDERAL TRADE COMMISSION, Petitioner,
vs.
ELMER C. ADAMS, JR., and ADAMS DAIRY, INC., Respondents. — No. 12978.

ORDER

The above entitled causes are hereby consolidated for the purposes of this order.

The Petitioner filed these two proceedings pursuant to the provisions of §49, Title 15, U.S.C.A., to compel the attendance of witnesses and the production of documents pursuant to subpoenaes duces tecum and ad testificandum directed to the respondents, before a hearing examiner.

The Federal Trade Commission filed three complaints against the Adams Dairy Company; Adams Dairy, Inc.; The Kroger Company; Safeway Stores, Inc.; and Great Atlantic & Pacific Tea Company, Inc. The three complaints

are identical, except as to name, and generally charge that the:

> "Adams Dairy Company and Adams Dairy, Inc., is in substantial competition with numerous other dairy concerns operating in the States of Missouri, Kansas, Illinois, and Kentucky, in the processing, distribution and sale of dairy products, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth." [The same allegation appears in each complaint with respect to each defendant grocery company.]

It is further alleged that:

> "For many years, and continuing to the present time, respondents Adams Dairy Company and Adams Dairy, Inc. * * * and [naming the grocery company involved], have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade of said products as is more fully set out in Paragraphs Five and Six hereof.
>
> "PARAGRAPH FIVE: As a part of, pursuant to and in furtherance of the aforesaid agreement, understanding, combination and conspiracy, respondents have, for many years past and to the present time, performed and pursued the following acts, policies and practices:
>
> 1. Fixed prices and price differentials in the sale of dairy products and coerced competitors into maintaining prices and price differentials in said products.
>
> 2. Respondent Kroger, in connection with the sale at retail of the dairy products of respondent dairies, has engaged and is engaging in the following acts and practices, among others:

(a) Charging lower prices for the dairy products of respondent dairies, directly and through the use of coupons, free merchandise or other devices furnished by respondent dairies, in certain areas than those charged elsewhere;

(b) Engaging in price wars in the sale of dairy products in certain areas with the purpose of or the natural and probable effect of injuring and destroying competition in said dairy products;

(c) Denying to competitors and potential competitors of respondent dairies a reasonable opportunity to compete for the dairy product purchases of respondent Kroger and otherwise giving respondent dairies preferential treatment in its retail stores.

3. Respondent dairies have subsidized the acts, practices and policies of respondent Kroger set out in paragraph 2 hereof in the sale and distribution of dairy products in certain areas within the states above named by the following means, among others:

(a) Selling said products to respondent Kroger in certain areas at prices lower than those charged elsewhere by said respondent dairies, including prices that were below cost;

(b) Furnishing coupons, free merchandise and other devices for use in the retail sale of the dairy products of respondent dairies by respondent Kroger in certain areas and not elsewhere;

(c) Guaranteeing a fixed profit margin to respondent Kroger in its sale of said dairy products regardless of the price at which such products are sold to the consumer;

(d) Contributing advertising allowances to respondent Kroger upon terms not accorded or offered to all competing purchasers of dairy products on proportionally equal terms.

PARAGRAPH SIX. The conspiracy, combination, agreement and understanding and the acts and practices of respondents pursuant to and in furtherance of same, as alleged herein, have had and do have the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the processing and sale of dairy products; have had and do have a tendency to unduly hinder competition or to create in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors in the processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Subsequent to the filing of the Complaints, a Hearing Examiner was selected for the purpose of investigating and hearing testimony concerning the charges made against the parties. Subpoenas duces tecum and ad testificandum were issued for Elmer C. Adams, Jr. and the Adams Dairy, Inc. and for Elmer C. Adams, Sr. and The Adams Dairy Company, to appear before the Hearing Examiner on February 18, 1960.

The respondents filed Motion to Quash the subpoenas which the Hearing Examiner overruled. Respondents thereupon appealed the ruling to the Commission, and the appeal was denied by the Commission on July 28, 1960.

Thereafter, the Examiner ordered hearings to be held September 12, 1960, at Kansas City, ordering respondents to comply with the subpoenas at that time. Respondents

refused to comply and these proceedings were instituted by the Commission in accordance with the statute, *supra*.

The subpoenas duces tecum and ad testificandum were identical in each case [except as to name] and were as follows (Caption omitted):

Specifications:

1. Such books, records, or a verified summary thereof, and documents, as will disclose the following with regard to Adams Dairy, Inc.:

(a) The types of dairy products manufactured, processed, distributed or sold during the period from the date of incorporation of said corporation to September 24, 1959.

(b) The geographical areas in which each type of dairy product covered by item (a) above was distributed and sold as of September 24, 1959.

2. Copies of all corporate annual reports to stockholders and all profit and loss statements prepared by Adams Dairy, Inc. or by the direction of said corporation, its officers, employees, representatives or agents from the date of incorporation of said corporation to September 24, 1959.

3. Such correspondence, communications, telegrams, bulletins, minutes of meetings (including all original notes, drafts and final documents), inter-office memoranda, intra-office memoranda, inter-company memoranda, and reports or file copies of the same together with all writings, whether typewritten, handwritten or otherwise, received, transmitted or prepared by Adams Dairy, Inc., its officers, employees, representatives or agents during the period from January 1, 1950 to September 24, 1959, concerning or in any way relating to the securing or maintaining of licenses or permits including health permits, motor vehicle licenses, and other types of licenses or permits required by law.

4. Such correspondence, communications, telegrams, bulletins, minutes of meetings (including all original notes, drafts and final documents), inter-office memoranda, intra-office memoranda, inter-company memoranda and reports or file copies of the same together with all other writings whether typewritten, handwritten or otherwise, received, transmitted or prepared by Adams Dairy, Inc., its officers, employees, representatives or agents during the period from the date of incorporation of said corporation to September 24, 1959, concerning or in any way relating to the establishment, initial operation or incorporation of Adams Dairy, Inc.

5. Such correspondence, communication, telegrams, bulletins, minutes of meetings (including all original notes, drafts and final documents), inter-office memoranda, intra-office memoranda, inter-company memoranda, contracts, agreements and reports or file copies of the same together with all other writings whether typewritten, handwritten or otherwise, received, transmitted or prepared by Adams Dairy, Inc., its officers, employees, representatives or agents during the period from the date of incorporation of said corporation to September 24, 1959, concerning or in any way relating to said corporation's relations, dealings or business with:

(a) The Kroger Company;

(b) Safeway Stores, Inc.;

(c) The Great Atlantic & Pacific Tea Company, Inc.

6. Such correspondence, communications, telegrams, bulletins, minutes of meetings (including all original notes, drafts and final documents), inter-office memoranda, intra-office memoranda, inter-company memoranda, contracts, agreements and reports or file copies of the same together with all other writings whether typewritten, handwritten or otherwise, received, transmitted or prepared by Adams Dairy, Inc.

its officers, employees, representatives or agents during the period from October 1, 1954, to September 24, 1959, concerning or in any way relating to said corporation's relations, dealings or business with all dairy product customers other than The Kroger Company, Safeway Stores, Inc., and The Great Atlantic & Pacific Tea Company, Inc.

7. Such books, records, or a verified summary thereof, and documents, containing the names and addresses of all of the customers who purchased Adams Dairy, Inc., dairy products for resale during the period from October 1, 1954, to September 24, 1959.

8. Such books, records, or a verified summary thereof, and documents, showing for the period from October 1, 1954, to September 24, 1959:

(a) The annual net sales of Adams Dairy, Inc., of dairy products in dollars and gallons or pounds;

(b) The monthly net sales of Adams Dairy, Inc., in dollars and by quantities of each container size for each type of dairy product sold by Adams Dairy, Inc., directly or indirectly to each of the following:

(1) The Kroger Company;

(2) Safeway Stores, Inc.;

(3) The Great Atlantic & Pacific Tea Company, Inc.;

(c) Each of the locations to which dairy products listed in answer to specification (b) above were delivered and by whom.

9. Such books, records, or a verified summary thereof, and documents, as will disclose all rebates, discounts, use of coupons, free merchandise, or any other form of reduction in price given directly or indirectly by Adams Dairy, Inc., during the period from October 1, 1954, to September 24, 1959, together with the names and addresses of the recipients.

10. Such books, records, or a verified summary thereof, and documents, as will disclose payments, loans, advances, gifts, or anything of value made directly or indirectly to Adams Dairy, Inc., its officers, employees, representatives or agents from the date of incorporation of said corporation to September 24, 1959, by The Kroger Company, Safeway Stores, Inc., or The Great Atlantic & Pacific Tea Company, Inc., in connection with the production, processing, purchase, distribution or sale of dairy products or in connection with the establishment, operation or incorporation of said dairy.

11. Such books, records, and documents showing the names and addresses of all suppliers of fluid milk to Adams Dairy, Inc., during the period from October 1, 1954, to September 24, 1959.

12. Such books, records or a verified summary thereof, and documents, showing the total number of milk cartons purchased annually by Adams Dairy, Inc., the suppliers thereof and the dollar value of said annual purchases of cartons for the period from October 1, 1954, to September 24, 1959.

13. Such books, records or a verified summary thereof, and documents as will disclose the names of all distributors of dairy products for Adams Dairy, Inc., from the date of incorporation of said corporation to September 24, 1959, together with the following information for each distributor so listed:

(a) the last-known mailing address of each distributor;

(b) the date on which each distributor began handling Adams dairy products;

(c) the date on which any distributor stopped handling Adams dairy products (where applicable);

(d) the reason or reasons why each distributor listed in specification 14(c) stopped handling Adams dairy products;

(e) a list of all cities and towns which made up each distributor's original route;

(f) a list of any and all changes which were made in the route of each distributor together with the date of such change or changes;

(g) the names and addresses of all local customers who purchased Adams dairy products from each distributor listed in the answer to specification 13.

14. Such books, records, or a verified summary thereof, and documents, recording or in any way concerning or relating to payments, rebates, discounts, loans, guarantees, advances, gifts, or anything of value directly or indirectly made by Adams Dairy, Inc., its officers, employees, representatives or agents to any or all of its distributors during the period from the date of incorporation of said corporation to September 24, 1959.

15. Such books, records, documents or price lists as will disclose the prices of Adams dairy products in effect on October 1, 1954, in each of the following communities served directly or indirectly by Adams Dairy, Inc., and all subsequent changes in such price lists to September 24, 1951:

Kansas	*Illinois*	*Missouri*
Atchison	Alton	Cape Girardeau
Coffeyville	Cairo	Charleston
Fort Scott	Carbondale	Columbia
Kansas City	Chester	Hannibal
Manhattan	Decatur	Jefferson City
Pittsburg	East St. Louis	Joplin
Topeka	Mt. Vernon	Maryville
	Springfield	Mexico
	Vandalia	Moberly
Kentucky		Poplar Bluff
Mayfield		Rolla

Murray
Paducah

St. Charles
St. Joseph
St. Louis
Sikeston
Springfield"

In the Motion to Quash before the Commission, the Respondents contend:

"1. The subpoena is vague and indefinite.

2. The subpoena does not comply with the Commission's Rules or the Administrative Procedure Act.

3. The subpoena requires the revelation of trade secrets and confidential information.

4. The return date of April 5, 1960, cannot be complied with.

5. The subpoena imposes an unreasonable burden.

6. The subpoena asks for many documents already furnished to the Commission.

7. The subpoena would require the shipment of much material to Washington, D.C. [The place of hearing was later changed.]

8. The subpoena requires information which is not in the care, control or custody or within the knowledge of the respondent.

9. The geographic scope of the subpoena is too broad.

10. The time periods covered by the subpoena are too broad.

11. The definition of dairy products.

12. The overlap of specifications.

13. The bookkeeping basis.

14. Deletion of 'all other writings.'

15. Limitation of specifications as to suppliers of dairy products."

In this court the respondents not only attack the validity of the subpoenas but likewise the sufficiency of the Complaint filed in each case, and contend that the Complaint does not comply with the rules of the Federal Trade Commission in respect to the information that shall be set out in the Complaint, and that any subpoenas or process issued pursuant to said Complaint are likewise void.

The Petition insists that this court is without jurisdiction to determine the question of the sufficiency of the Complaint, that the right is vested solely in the Court of Appeals. With this contention I am in accord. I do not believe this court has jurisdiction to determine that question. But, even assuming the correctness of respondents' contention that this court does have jurisdiction to pass on that question, it is my belief that the Complaint is adequate upon which to base the issuance of a subpoena, and to conduct the examinations incident to the investigation of the complaints against the various parties.

That brings us to the more serious question of the enforcement of the subpoenas. The statute, §49, *supra*, provides among other things that:

> "* * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

The second paragraph of the section provides:

> "Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission *may* invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." [Emphasis supplied]

The third paragraph, with which we are particularly concerned here, provides:

> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on *may*, in the case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Section 1005(c), Title 5 of the Administrative Procedure Act, provides:

> "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with the law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time * * *."

Certainly when the Congress imposed upon the court the power to aid administrative agencies in the carrying

out of their functions, and when the section uses the word "may", I do not construe it to mean "shall". I think the court has some discretion in determining the extent to which the subpoena should be enforced.

An examination of the subpoenas in this case leads me to the conclusion, without questioning in any degree the right of the Commission to conduct its hearing or to proscribe or limit the extent thereof, that the subpoenas seek information which has absolutely no relevancy, are too broad in extent, geographically and otherwise, and place an undue burden upon the Respondents, and I think the court would be justified in refusing altogether to require compliance therewith.

However, in view of the importance of the matter and the extent to which it has already been carried on, I think this court should not deal with the subject in that manner, but should be more specific in its findings.

First, it is admitted that in a prior Congressional hearing, the respondents produced a great amount of documentary evidence before the Congressional Committee in Washington, and that photostatic copies were taken and are in possession of the Government or readily accessible to the Government. Some question is raised by the Petitioner that the photostats may not be accepted as evidence, and for that reason, the originals should be made available again.

For the purpose of this hearing, I see absolutely no reason why the respondents should be required to produce at a hearing, any documents or records, photostats of which are now in the possession of the Petitioner, or available to it, as a result of any hearing which has heretofore been held with respect to the identical matter which is now in question.

The procedure in this case, it seems to me, so far as this court is concerned, should be little, if any, different than that in an anti-trust case, where the court may, at least to some extent, determine whether records and documents which are to be produced, have any relevancy. The court is not unmindful of our own rule which enables litigants to obtain documents and evidence, which, of themselves, may not be admissible but which may lead to admissible evidence or testimony.

But, to require an individual or corporation to gather up and produce at a hearing, every conceivable type of document or record, memoranda or inter-office communication incident to the conduct not only of its business, but of those who are associated with it over a long period of time, seems utterly unreasonable to me. If the Petitioner desires information concerning such documents and records, I think it should be made available for inspection and photographing, if it is desired, rather than to require that it be "carted" to the place of hearing.

The Complaint charges a conspiracy to fix prices, and certain overt acts to carry out the conspiracy. In some instances, the information sought by Petitioner's subpoenas extends or begins with a period in 1954, and in other instances they seek to go back to 1940, more than 20 years. I can see no reason for going back 20 years.

Therefore, the court will decline to enforce the provisions of the subpoenas with respect to the first specification, which would require the company to produce its records from January 1, 1940 through September 24, 1959. The period subsequent to 1954 should be adequate.

The requirements of Specification 2 are entirely too broad in scope, and the court will decline to enforce its provisions.

The requirements of Specification 3, in the opinion of the court, are entirely unreasonable, arbitrary and too broad in their scope, and the court will decline to enforce its provisions.

The same is true of Specification 4. Not only is it too broad in its scope, but some of the documents, it is perfectly obvious, would not be in the possession of the respondents, and the court will not presume to say what should and should not be produced.

Specification 5, if it were confined to the correspondence between the respondent and the Kroger Company, Safeway Stores, Inc., and the Great Atlantic & Pacific Tea Company, Inc., would be a perfectly valid request, but, to include therein such information as may have been prepared by officers, employees or representatives or agents during the period 1940 through 1959, in the opinion of this court, is entirely too broad, and the court will not enforce its provisions.

Specification 6, with the exception of memorandum made by officers, employees, representatives or agents of respondents during the period 1954 to 1959, should be produced.

The requirements of Specification 7 should be met.

With respect to Specification 8, it is rather difficult for me to see how the respondents could be required to comply with paragraph (b) in supplying information with respect to each container size for each type of dairy product sold by Adams directly or indirectly to Kroger, Safeway or the Great Atlantic & Pacific Tea. It seems to me that to produce records to specify each container over a long period of time that went into a store doing the volume of business as the stores named therein would require a boxcar to contain them, and I can see no justifica-

tion for it, and the court will decline to enforce its provisions. The same would be true of specification (c) of the above specification.

The requirements of Specification 9 should be met.

Specification 10 falls in the same category as No. 1, and the others, not only with respect to the time element, but as to the information sought. It seems to me it would be utterly impossible to comply therewith.

Specification 11 seems rather broad in its demands, but if the respondents have such information, I see no reason why it should not be supplied.

Specification 12 the same reasoning may be applied thereto. Undoubtedly the ordinary books and records of the company would reveal this information.

Specification 13 seeks information from the time of the incorporation in 1940 to 1959. In the opinion of the court it is entirely too broad in point of time, and the information sought is unreasonable, has no relevancy to the charges made against the respondents, and the petition for the enforcement of that specification is denied.

Specification 14 calls for records from the time of the incorporation over a period of twenty years, and the petition for the enforcement of that specification is denied.

Specification 15 calls for information concerning prices in thirty-five towns in Missouri, Kansas, Illinois and Kentucky. If this information is available without an audit of the company's books, it should be made available. If it requires an audit of the company's books, I think the books should be made available to the petitioner so that it may do the work. To that extent the petition is granted.

Any matters that the court has ruled upon that are too indefinite to comply with, may be brought back to the

court for furtheir consideration, in the event of a disagreement of the parties.

/s/ R. M. Duncan,
Richard M. Duncan,
Judge.

Dated: March 27, 1961.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1961.

Elmer C. Adams, Sr., and Adams Dairy Company, and Elmer C. Adams, Jr., and Adams Dairy, Inc.,
Appellants,
No. 16,745.
vs.
Federal Trade Commission.

Appeal from the United States District Court for the Western District of Missouri.

and

Federal Trade Commission,
Appellant,
No. 16,747.
vs.
Elmer C. Adams, Sr., and Adams Dairy Company, and Elmer C. Adams, Jr., and Adams Dairy, Inc.

Appeal from the United States District Court for the Western District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the portion of the Order of the said District Court determining that it lacked jurisdiction to test the sufficiency of the Complaint, appealed from in case No. 16745, be, and is in that respect, affirmed.

And it is further Ordered and Adjudged by this Court that the portion of the Order of the said District Court appealed from in case No. 16747, be, and is hereby reversed.

And it is further Ordered by this Court that this cause (Appeal No. 16747), be, and is hereby, remanded to the said District Court with instructions to that Court to direct by appropriate order enforcement of all of the subpoenas issued in the proceeding instituted by the Commission, in accordance with the determinations made in the opinion of this Court this day filed herein.

November 24, 1961.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Elmer C. Adams, Sr., and Adams Dairy Company, Elmer C. Adams, Jr., and Adams Dairy, Inc., Appellants, vs. Federal Trade Commission, Appellee.	No. 16,745 Appeal from the United States District Court for the Western District of Missouri.
Federal Trade Commission, Appellant, vs. Elmer C. Adams, Sr., and Adams Dairy Company, Elmer C. Adams, Jr., and Adams Dairy, Inc., Appellees.	No. 16,747 Appeal from the United States District Court for the Western District of Missouri.

[November 24, 1961.]

Before SANBORN, MATTHES and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

These are cross appeals from an order of the United States District Court for the Western District of Missouri entered in connection with proceedings pending before the Federal Trade Commission.

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A. §§41 *et seq.*, 52 Stat. 111), the Federal Trade Commission, on September 24, 1959, issued complaints as follows: In Commission Docket No. 7596 against Adams Dairy Company, Adams Dairy, Inc. and The Kroger Company; in Commission Docket No. 7597

against Adams Dairy Company, Adams Dairy, Inc. and Safeway Stores, Inc.; and in Commission Docket No. 7598 against Adams Dairy Company, Adams Dairy, Inc. and The Great Atlantic and Pacific Tea Company, Inc.[1] The complaints are similar, each alleging that Adams and one of the grocery corporations, Kroger, Safeway or A & P, have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade, in violation of §5 of the Act.[2] The practices, acts and conduct of the respondents relied upon in part in furtherance of the conspiracy are alleged in more detail and will be elaborated on in considering Commission's appeal in No. 16,747.

On February 18, 1960, the hearing examiner assigned to conduct the hearing issued six administrative subpoenas

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1. The complaints allege: Adams Dairy Company is a Missouri corporation with its principal office and place of business in Blue Springs, Missouri; Adams Dairy, Inc., is a Missouri corporation with its principal office and place of business in St. Louis, Missouri; The Kroger Company, Safeway Stores, Inc. and The Great Atlantic and Pacific Tea Company are in the operation of retail grocery stores located in different states. The record also discloses that Elmer C. Adams, Sr. is president of Adams Dairy Company and Elmer C. Adams, Jr. is secretary of Adams Dairy, Inc. For convenience and brevity Adams Dairy Company and Adams Dairy, Inc. will collectively be referred to as Adams, and singularly as ADC and ADI; Elmer C. Adams, Sr. as Adams, Sr., Elmer C. Adams, Jr. as Adams, Jr.; The Kroger Company as Kroger, Safeway Stores, Inc. as Safeway, The Great Atlantic and Pacific Tea Company as A & P, and the Federal Trade Commission as Commission.

2. Section 5 of the Act, 15 U.S.C.A. §45, provides:

"(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent * * * corporations [exceptions here not material] from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

ad testificandum and *duces tecum*. Three were issued to Adams, Sr. and ADC and three were issued to Adams, Jr. and ADI. While the subpoenas are similar as to documentary material called for, there are differences, and during consideration of the appeal in No. 16,747, additional reference will be made of such differences as far as may be necessary to resolution of the questions presented therein. Motions to quash the subpoenas were filed by Adams, Sr., Adams, Jr. and Adams, and were overruled by the hearing examiner and the Commission denied an appeal from his ruling. On September 12, 1960, at Kansas City, Missouri, the examiner was advised that Adams, Sr. and Adams, Jr. would not comply with the subpoenas. On September 12, 1960, the Commission applied to the United States District Court for an order to compel attendance of witnesses and production of documents at times and places to be fixed by the hearing examiner.[3] An order to show cause was issued by the district court and thereafter respondents in said proceeding (Adams, Sr. and Adams, Jr. and Adams) filed returns alleging, inter alia, that the subpoenas were invalid because they were not issued pursuant to a lawful complaint.

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3. Section 9 of the Act, 15 U.S.C.A. § 49, in pertinent part is as follows:

"* * * And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof."

Following submission of the administrative subpoena enforcement proceedings to the district court, the hearing examiner scheduled a hearing for February 6, 1961, in Kansas City, Missouri. The Commission's counsel advised appellants in No. 16,745 that, among others, employees of Safeway, apparently officials of that company, would be questioned regarding operations of Safeway and the relationship which such officials have had with Adams. An unsuccessful attempt was made to secure cancellation of the hearing and thereupon Adams filed a motion in the United State District Court for the Western District of Missouri to stay the proceeding scheduled for February 6, 1961. The basis for this motion was that the Commission was seeking the same information from Safeway employees that it sought to obtain from Adams, Sr., Adams, Jr. and Adams by the subpoenas under attack, before the district court had determined whether the subpoenas should be enforced. The court issued an order to show cause and an order staying the hearing until the further order of the court. On March 27, 1961, the district court issued its order granting in part and denying in part the petition of the Commission for enforcement of the subpoenas and denying the motion to stay further proceedings. These appeals are from this order. The hearing examiner on March 31, 1961, scheduled another hearing for April 17, 1961, in Kansas City, Missouri. Appellants in No. 16,745 were advised that the subject matter of the hearing scheduled for that date was the same as that stated for the hearing previously set for February 6, 1961. Again Adams requested that the hearing be continued and when the request was denied, motions were filed in this court on April 14, 1961, for an order to stay further proceedings by the Commission. Upon consideration of the motions, we directed that the Commission show cause on or before April 24, 1961, why the hearing scheduled for April 17, 1961, would not have the operation and effect of depriving Adams of their rights on

appeal as well as also circumventing the benefits and rights accruing to them under the parts of the order from which the Commission had appealed issued in the district court on March 27, 1961. We also directed that the hearing scheduled for April 17, 1961, be stayed until the disposition of the matter on the show cause order. After a hearing on April 24, 1961, this court, on May 16, 1961, entered an order denying the motion of Adams to stay or postpone the Commission's taking of evidence and testimony from Safeway and vacating the temporary stay or postponement theretofore granted.

APPEAL IN NO. 16,745

Is the district court vested with jurisdiction to consider and adjudicate the sufficiency of the original complaints filed by the Commission in the proceedings pending before that agency? That is the sole question presented for determination in this appeal. Appellants concede that the Commission was authorized under §5 of the Act to institute and prosecute proceedings for the purpose of determining whether there has been a restraint of trade as proscribed by §1 of the Sherman Act. But they contend that the district court is authorized to test the sufficiency of the complaint for the purpose of determining whether it forms a basis for the issuance of subpoenas. The Commission's position is that this is a function within the exclusive jurisdiction of the Commission and, upon review, within the exclusive jurisdiction of this court.

The district court sustained the Commission, stating in its order of March 27, 1961: "The Petitioner [Commission] insists that this court is without jurisdiction to determine the question of the sufficiency of the Complaint, that this right is vested solely in the Court of Appeals. With

this contention I am in accord. I do not believe this court has jurisdiction to determine that question."

Section 5(b) of the Act, 15 U.S.C.A., §45(b), authorizes the Commission to issue complaints, conduct proceedings, hold hearings, resolve issues, and to enter appropriate orders. Section 5(c), 15 U.S.C.A. §45(c), provides for a review of the proceedings before the Commission by the appropriate United States Court of Appeals, and §5(d), 15 U.S.C.A. §45(d), provides: "The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." The Act does not expressly, or by implication, confer upon district courts authority to interfere with proceedings properly and lawfully instituted. Not only is there no statutory support for the contention advanced by appellants, but such a concept is contrary to the deep-rooted principle that parties must exhaust their administrative remedies before they can properly and successfully enlist the aid of courts. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L.Ed. 638; *Newport News Shipbuilding & Dry-dock Co. v. Schauffler*, 303 U.S. 54, 58 S. Ct. 466, 82 L.Ed. 646; cf. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S. Ct. 963, 82 L.Ed. 1408; *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 129, 130, 59 S. Ct. 754, 83 L.Ed. 1147; *United States v. Illinois Central R. R. Co.*, 244 U.S. 82, 37 S. Ct. 584, 61 L.Ed. 1007. See also note in 51 Harvard Law Review, p. 1231, Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts. In *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, a

4. The court went further and held that even if appellants were correct in their contention that the court possessed jurisdiction to pass on the question, it was of the opinion that the complaint is adequate upon which to base the issuance of a subpoena and to conduct the examination incident to the investigation of the complaints against the various parties.

leading case on the subject of exhaustion of administrative remedies, the Supreme Court, speaking through Mr. Justice Brandeis, stated, 303 U. S. at pp. 51-52:

> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

In *Chamber of Commerce* v. *Federal Trade Commission*, 8 Cir., 280 Fed. 45, we considered the question and stated at p. 48:

> "It is our judgment that neither the District Court nor this court has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside."

In *Chamber of Commerce*, *supra*, and in *Crowen Zellerbach Corporation* v. *Federal Trade Commission*, 9 Cir., 156 F.2d 927, unsuccessful attempts were made in the district court to enjoin agency action. While appellants are not directly challenging the power of the Commission to proceed with the investigation initiated by it, their attempt to curb any power of the Commission through an assault on the complaint because of vagueness and indefiniteness, is an effort to accomplish by indirection what they cannot do by direct action. *Miles Laboratories* v. *Federal Trade Commission*, D.C. Cir., 140 F.2d 683, cert. den. 322 U.S. 752; *Perkins* v. *Endicott Johnson Corp.*, 2 Cir., 128 F.2d 208, aff'd 317

U.S. 501, pertinently enunciates the principle in this language, 128 F.2d at pp. 218-219:

> "Had the defendants in the case at bar sought an injunction against the administrative proceeding, they would have failed in their effort. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 1304 U.S. 375 (1938); *Myers* v. *Bethlehem Corp.*, 1303 U.S. 41 (1938); *Newport News Co.* v. *Schauffler* 1303 U.S. 54 (1938). Yet if the trial court's position in the instant case were tenable, the same result could be accomplished by indirection: a respondent in an administrative hearing could refuse to respond to a subpoena and in a suit in court to compel enforcement of the subpoena, the court could do what it is forbidden to do under *Blair* v. *United States* 1250 U.S. 273 (1919). The doctrine of the *Bethlehem*, *Schauffler* and *Edison* cases would become frivolous and lack real substance: it would relate merely to one procedural device utilized by a respondent wishing to have the courts interfere with what the Supreme Court said, in those cases, was the 'exclusive initial power' of the administrative officials to investigate and determine their own jurisdiction. If defendants were to win here, they would have discovered a way of 'running around the end' when blocked at the center. We do not take so lightly those recent and as yet undisturbed Supreme Court decisions."

After this case has run the gamut of administrative proceedings and if an order is entered adversely affecting appellants, they may, if they so desire, secure judicial review of any action taken by the Commission. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643, but until the administrative proceedings have been exhausted and terminated, they cannot permissibly invoke the aid of a court for the purpose of securing judicial determination of the question here presented.

The district court properly determined it lacked jurisdiction to test the sufficiency of the complaint, and its order in that respect is affirmed.

APPEAL IN No. 16,747

Commission's appeal is from the court's order denying enforcement of part or all of a number of specifications of the subpoenas duces tecum and from the court's failure to enforce other provisions of the subpoenas. The parties to whom the subpoenas were directed (Adams Sr. and ADC, Adams, Jr. and ADL) did not appeal from that portion of the order directing enforcement as to the whole or portions of certain specifications. Thus, the appeal brings into focus the propriety of the court's action in denying enforcement. Before proceeding to consideration of the specifications, enforcement of which was denied, we examine the legal standards or guides which are to be applied in resolving the enforcement issue.

Section 9 of the Federal Trade Commission Act, Title 15 U.S.C.A. § 49, empowers the Commission to examine documentary evidence of any corporation being investigated or proceeded against, and to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence *relating to any matter under investigation*." (Emphasis supplied.) This statutory authority was judicially determined to be similar to discovery proceedings afforded by the Federal Rules of Civil Procedure by the Supreme Court of the United States in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, where the court stated at p. 216:

> "The result therefore sustains the Administrator's position that his investigative function in searching out violations with a view to securing enforcement of the Act is essentially the same as the grand jury's or

the court's in issuing other pretrial orders for the discovery of evidence and is governed by the same limitations. These are that the agency not act arbitrarily or in excess of its statutory authority, but this does not mean that its investigation must be limited to . . . to forecasts of the probable result of the investigation.

The investigatory authority of an administrative agency is not without limitation. There is general unanimity among the courts that a subpoena meets the requirements for enforcement if the inquiry is (1) within the authority of the agency, (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant. *United States v. Morton Salt Co.*, 338 U.S. 632, 652-653; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509; *Civil Aeronautics Board v. Hermann*, 353 U.S. 322; *United States v. Woerth*, 130 F.Supp. 930, 942, aff'd sub nom. *Woerth v. United States*, 8 Cir., 231 F.2d 322; *Chapman v. Mayo Elmwood College*, 9 Cir., 225 F.2d 239; *McMann v. Securities and Exchange Commission*, 2 Cir., 87 F.2d 377, cert. den. *McMann v. Eggo*, 301 U.S. 684; *Hunt Foods and Industries, Inc. v. Federal Trade Commission*, 9 Cir., 286 F.2d 803, 811, cert. den. 365 U.S. 877; *McGarry et al. v. Securities and Exchange Commission*, D.C., 147 F.2d 389, 392; *Walling v. American Rolbal Corporation*, 2 Cir., 135 F.2d 1003, 1005; *Federal Communications Commission v. Cohn*, S.D.N.Y., 154 F.Supp. 899.

It is rare to appear that the demand is too indefinite or that the data sought is not reasonably relevant, the agency action is generally recorded as being unreasonable and arbitrary, and the courts will deny enforcement. As stated in the Cohn case, supra, "Of course the subpoena power must at all times be confined to the rudimentary principles of justice, and the courts will plainly refuse to

enforce an administrative subpoena which is not within the bounds of reasonableness." 154 F. Supp. 908. "The process is lawful if it confines its requirements within the limits which reason imposes in the circumstances of the particular case." *McGarry et al. v. Securities and Exchange Commission, supra*, 147 F.2d at p. 392.

Initially the administrative agency must exercise its discretion in determining what information it will require in making the investigation, but when the jurisdiction of the court is invoked in an enforcement proceeding, it must be judicially determined whether the agency abused its discretion; in other words, the court must determine whether the subpoena power has been confined to the rudimentary principles of justice. *Federal Communications Commission v. Cohn, supra; McGarry et al. v. Securities and Exchange Commission, supra; cf. Walling v. American Rolbal Corporation, supra.*

While there is a suggestion by appellees that the specifications fail to properly specify the documents sought, their principal claim is that the subpoenas called for irrelevant material and that "they are unduly broad and burdensome and unreasonable in scope." In determining whether the Commission is entitled to enforcement in light of the standards or tests to be applied, we must lay the specifications alongside the complaints. In summary, the complaints charge Adams and the respective grocery companies (Kroger, Safeway and A & P) with maintaining a conspiracy in restraint of interstate trade in Missouri, Kansas, Illinois and Kentucky. Each complaint alleges, inter alia, that in furtherance of the conspiracy, the named respondents had pursued the policy and practice of fixing prices and coercing competitors into maintaining prices and price differentials that the grocery companies had engaged in territorial price wars and price discriminations and had given preferential

treatment to Adams; that Adams had subsidized the practices and policies of the grocery companies in certain areas by various methods, which are enumerated in detail.

Since the parties are thoroughly familiar with the specifications and the precise data called for, we conclude that a summary thereof will suffice for purpose of this opinion.

Inasmuch as the district court's order dealt with the specifications in the subpoenas directed to Adams, Jr. and ADI, our summarization will be of the same subpoenas with appropriate references to subpoenas directed to Adams, Sr. and ADC.

1. Books, records, etc., showing:

(a) types of products manufactured, processed, distributed, or sold from date of incorporation to September 24, 1959;

(b) geographical areas in which each type of product in (a) was distributed and sold.

The district court enforced this provision but limited the time period, stating "the period subsequent to 1954 should be adequate."[6] The Commission contends the data sought by this specification is necessary to determine the nature and scope of Adams' business and is relevant to the allegation that the companies are engaged in interstate commerce. The period between October 1, 1954, and September 24, 1959, should prove entirely adequate to establish the nature and scope of Adams' business and that they are

5. It appears that ADC was incorporated in 1940 and Commission states it has reason to believe the ADI was incorporated in 1947. This is not disputed by ADI.

6. In a number of the specifications the Commission fixed the cut-off date for data sought as October 1, 1954, or approximately five years prior to the date the complaints were filed.

engaged in interstate commerce, concerning which there should not be much dispute.

> 2. Copies of annual reports to stockholders and profit and loss statements from date of incorporation [from January 1, 1940, for ADC] to September 24, 1959.

The district court refused to enforce this provision, stating that it was too broad in scope. However, since a conspiracy to fix prices is alleged to have existed "for many years past" the material sought is relevant as it may disclose business relations with other companies and profit trends. As pointed out in *Federal Communications Commission* v. *Cohn*, *supra*, broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant. It is readily apparent that many of the specifications of the subpoenas are broad in scope. However, when a conspiracy is alleged the search might take a broad sweep in order that information revealing the nature of the relationship between the alleged co-conspirators can be obtained.

> 3. Any documents or writings relating to securing or maintaining licenses and permits required by law from January 1, 1950, to September 24, 1959.

The district court refused enforcement of this provision, stating that it was unreasonable, arbitrary and too broad in scope. The record reveals that subsequent to the filing of the complaint Adams filed motions for a bill of particulars and raised an issue regarding the use of independent distributors in the sale of their products. The method of distributing dairy products, that is, whether by independent contractors or agents and employees of Adams, is, in our opinion, relevant to the issue of Adams' responsibility for the acts and conduct of these distributors of dairy products. The documents called for in this specification should

be limited, however, to the period from October 1, 1954, to September 24, 1959.

> 4. Any writing pertaining to the establishment, initial operation, or incorporation of ADI (ADC) prepared by ADI (ADC) officers, representatives or agents; from date of incorporation [from January 1, 1940, for ADC] to September 24, 1959.

The district court denied enforcement of this provision for the same reason relied upon in denying enforcement of Specification 3. Commission asserts that the conspiracy charged was initiated at or about the time of incorporation of Adams. The record discloses that in 1941 there was correspondence between Safeway and a bank in Kansas City relating to a contemplated loan to be made by the bank to "Mr. Adams". In view of this circumstance and the assertion by Commission that the conspiracy has existed for many years, the documents called for are reasonably relevant. Enforcement of this specification should be granted.

> 5. Any writings prepared by ADI (ADC), employees, etc., pertaining to the company's relations, dealings or business with: Kroger, Safeway, A & P, from date of incorporation [from January 1, 1940, for ADC] to September 24, 1959.

The district court stated "If it [specification 5] were confined to the correspondence between the respondent and The Kroger Company, Safeway Stores, Inc. and The Great Atlantic and Pacific Tea Company, Inc. [it] would be a perfectly valid request". The remainder of the specification was in the court's opinion "entirely too broad." Recognizing that direct proof of a conspiracy generally is not available and that a conspiracy ordinarily is established by developing circumstances from various sources of information, we conclude that this specification should not be limited to correspondence by Adams. If in fact a conspiracy

was formed, evidence thereof is more likely to appear from other documents called for. Enforcement should be ordered.

> 6. Any writings of any kind prepared by ADI [ADC], employees, etc., pertaining to the company's relations, dealings, or business with dairy product customers other than the three companies named in Specification 5, from October 1, 1954, to September 24, 1959.

The trial court directed enforcement of this specification "with the exception of memorandum made by officers, employees, representatives or agents of respondents." The relevancy of the excluded memoranda is equally apparent. The specification should be enforced in toto.

Specification 7 was enforced by the district court and is not the subject of this appeal.

> 8. Books, records, etc., showing for the period October 1, 1954, to September 24, 1959:
>
> (a) annual net sales of dairy products in gallons or pounds and dollars;
>
> (b) monthly net sales in dollars and by quantities of each container size for each type of product sold directly or indirectly to Kroger, Safeway and A & P;
>
> (c) locations where items in (b) were delivered and by whom.

While the court apparently approved specification 8(a), it failed to specifically direct enforcement thereof. As to 8(b) and (c) the court entertained doubts as to "how the respondents could be required to comply * * *," stating that the records called for "would require a boxcar to contain them." In our view, the information called for in 8(b) and (c), while undoubtedly voluminous, may be revealing as to the effect of the alleged price wars, price discriminations and other practices charged in the com-

plaints. The court did not find that this data was irrelevant to the conspiracy charged. Enforcement should be granted.

Specification 9 was enforced and is not before us.

> 10. Books, records, etc., as will disclose payments, loans, advances, gifts or anything of value to ADI [ADC], officers, employees, etc., by Kroger, Safeway and A & P from date of incorporation [from January 1, 1940, for ADC] to September 24, 1959, in connection with production, processing, purchase, distribution or sale of products or with the establishment, operation, or incorporation of ADI [ADC or ADI].

The district court refused to enforce this as being too broad in time and in scope. Evidence of payments made by the grocery stores, or any of them, to either ADC or ADI in connection with the establishment, operation or incorporation of either of the latter companies, could constitute proof of the effectuating of the alleged conspiracy and this portion of the specification should be enforced from the date of incorporation of each of the dairy companies. However, to require ADC and ADI to furnish the data which would disclose payments by the grocery companies for dairy products purchased for 20 years in one case (ADC) and 13 years in the other (ADI) would subject both companies to a burden wholly out of proportion to the end sought. Enforcement as to this portion of Specification 10 should be granted from the period of October 1, 1954, to September 24, 1959.

Specifications 11 and 12 of the ADI subpoena were enforced by the district court. Specification 11 of the ADI subpoena is identical with that number in the ADC subpoena. However, Specifications 12, 13 and 14 of the ADC subpoena do not appear in the ADI subpoena and apparently were not considered by the district court, at least the order reflects no action taken thereon. Specification 12 calls for:

12. [ADC] Books, records, etc., showing annual purchases of fluid milk in dollars and quantity from Pure Milk Producers Association of Kansas City, Missouri, from October 1, 1954, to September 24, 1959.

Specification 13 requests the same documents with respect to milk purchased from the Milk Producers Marketing Company, Kansas City, Kansas. Inasmuch as the complaint alleges that ADC made sales to the named grocery corporations below cost, the data reflecting the cost to that company would be relevant.

"14. [ADC] Books, records, etc., showing the total number and dollar value of milk cartons purchased annually and suppliers thereof furnished to Milk Producers Marketing Company by ADC from October 1, 1954, to September 24, 1959.

The information sought by this specification is similar to that requested by Specifications 12 and 13 and is relevant for the same reason. Enforcement of these three specifications should be granted.

The remaining specifications are identical for ADC and ADI.

13. [15 ADC] Books, records, etc., disclosing names of all distributors of ADI [ADC] products from date of incorporation to September 24, 1959, and showing following information for each distributor:

(a) last mailing address;

(b) date when started handling ADI [ADC] products;

(c) date when stopped handling these products;

(d) reason distributors stopped handling these products;

(e) all cities and towns in distributor's original route;

(f) changes and dates changes in routes were made;

(g) names and addresses of all local customers of distributors.

The district court refused to enforce this specification, claiming it was too broad in time, was unreasonable and irrelevant. We agree with the district court to the extent that the subpoena is too broad in time. The Commission's position is that the documents sought are relevant to the determination of whether the distributors were independent contractors; for the purpose of determining the distributors which operated in a particular area and for the purpose of obtaining information relating to specific price wars, price discriminations and sales below cost. The relationship between the distributors and Adams is the subject of other specifications. The Commission has limited other specifications concerning price wars, price discriminations and sales below cost to the period subsequent to October 1, 1954 (e. g. see Specification 8), and we see no reason why this request should not be so limited. The period prior to October 1, 1954, is not reasonably relevant to these allegations, particularly in view of the fact that the Commission itself has concentrated on activities subsequent to this time. Enforcement should be ordered for the period from October 1, 1954, to September 24, 1959.

14. [16 ADC] Books, records, etc., showing payments, rebates, discounts, loans, guarantees, advances, gifts or anything of value made by ADI [ADC], its officers, employees, epresentatives or agents to any distributor from date of incorporation to September 24, 1959.

The district court again refused enforcement because the specification was too broad in time. For the reasons stated in regard to Specification 13 [ADC 15] the data called for

should be limited to the period from October 1, 1954, to September 24, 1959. Enforcement accordingly ordered.

The district court enforced Specification 15 [ADC 17] stating: "If this information is available without an audit of the Company's books, it should be made available. If it requires an audit * * * I think the books should be made available to petitioner so that it may do the work." The Commission does not object to the condition imposed, and we find it reasonable. Therefore, the specification should be enforced in the manner specified by the district court.

In addition to the disposition made by the trial court of the specifications, it ruled that appellees should not be required to produce any documents or records, photostats of which are now in possession of the Commission, or available to it as a result of any hearing which has heretofore been held with respect to the identical matter under consideration. From the record and briefs we are advised that the Subcommittee of Antitrust and Monopoly of the Senate Judiciary Committee has conducted an investigation of the dairy industry and Adams produced documentary evidence before that Committee. The district court was of the opinion that such evidence is available to Commission and therefore appellees should not be required to produce the same documents in hearings which may be conducted by the Commission. In its brief, Commission states it has obtained "a few documents" from the Subcommittee but that because of limitations imposed by the Subcommittee it did not receive a large portion of the documents which was made available to that Committee. The Commission's brief also states that appellees have been assured by the Commission that if they would identify and authenticate those documents which Commission has actually received, appellees would not be required to include such documents in their return that it does not desire a duplication of ma-

legal already in its possession. It appears to us that the offer of the Commission is reasonable and the court may properly include in its order such conditions or restrictions that may be necessary to assure compliance with the offer of Commission.

Finally, the court failed to order enforcement of the *ad testificandum* provisions of the subpoenas directed to Adams, Sr. and Adams, Jr. The Commission is unquestionably entitled to have these individuals appear as witnesses and the court should so order.

The order appealed from, in No. 16,747 is reversed and the cause is remanded with instructions to the district court to direct by appropriate order enforcement of all of the subpoenas issued in the proceeding instituted by the Commission in accordance with the determinations herein made.

A true copy.

Attest

Clerk, U. S. Court of Appeals, Eighth Circuit.

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7. In enforcement proceedings, the court is authorized to impose reasonable conditions and restrictions with respect to the production of data, documents, etc., designated in the subpoena. See and compare *Federal Communications Commission* v. *Cohn*, 154 F. Supp. 899, 913; *Waitung* v. *American Radial Corporation*, 2 Cir., 135 F.2d 1003, 1005; *Goldberg* v. *Truck Drivers*, 6 Cir., F.2d

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 741

ELMER C. ADAMS, SR., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A22-A41)[1] is reported at 296 F. 2d 861. The opinion of the district court (Pet. A4-A20) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1961 (Pet. A21). The petition for a writ of certiorari was filed on February 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet." refers to the petition. In accordance with the designation adopted in the petition (p. 2, n. 1), references to the printed record in the court of appeals will be cited as "R."

QUESTION PRESENTED

Whether, in an action to enforce administrative subpoenas issued by the Federal Trade Commission pursuant to complaints alleging that petitioners had violated Section 5 of the Federal Trade Commission Act, a district court has jurisdiction and is required to test the legal sufficiency of the complaints in determining the extent to which the subpoenas should be enforced.

STATUTES INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this Act * * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *
>
> * * * And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 6(c) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. 1005(c), is set forth in Appendix A to the petition (pp. A1–A2).

STATEMENT

This petition seeks review of an order of the Court of Appeals for the Eighth Circuit affirming the district court's holding that in proceedings brought by the Federal Trade Commission to enforce its subpoenas, the court was without jurisdiction to test the legal sufficiency of the underlying Commission complaints. The litigation began when the Federal Trade Commission filed three complaints against the Adams Dairy Co. ("ADC") and Adams Dairy, Inc. ("ADI"), each alleging that ADC, ADI and a named retailer grocery chain (Kroger, Safeway or A & P) had effectuated a conspiracy to restrain interstate trade by fixing prices and price differentials in the sale of dairy products and by coercing competitors into following the prices and price differentials thus set (R. 8–9; see R. 10, 11). More specifically, the complaints charged that pursuant to this conspiracy the petitioner dairies had (1) sold to the grocery chains in certain areas at prices lower than they charged in other areas, including prices below cost; (2) furnished coupons, merchandise and other devices for use by the chains in selling their milk products in certain areas but not otherwise; (3) guaranteed the chains a fixed profit margin on sales of their products, regardless of the prices at which they were sold to the consumers; and (4) contributed advertising allowances to the chain defendants not ac-

corded competing purchasers on proportionally equal terms (R. 9).[2] The complaints charge (see R. 9) that these conspiracies and acts and practices constitute unfair methods of competition and unfair acts and practices prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

A date having been set for a hearing on the charges, the hearing examiner issued a total of six subpoenas *duces tecum* and *ad testificandum* to various of the petitioners (Pet. A23–A24; see R. 12–18, 38–42). Following the denial of motions to quash (R. 19–28, 29–31), petitioners were ordered to comply and refused (Pet. A7–A8; see R. 32–35). Thereafter, the Commission instituted proceedings pursuant to Section 9 of the Federal Trade Commission Act (in the District Court for the Western District of Missouri) to obtain an order requiring production (R. 1–5, 37).[3]

The district court issued orders to show cause for the failure to comply (R. 44, 45) and the petitioners filed returns thereto contending that the complaints did not specify the charges with "reasonable definiteness" (R. 46) and therefore the subpoenas were "in-

[2] The chain store defendants were in turn charged, pursuant to the conspiracies, with (1) charging lower prices directly or indirectly (through bonus offers) for petitioners' goods in some areas than in others; (2) engaging in local price wars with the purpose and effect of injuring competition in dairy products; and (3) denying competitors and potential competitors of the dairy petitioners a chance to compete for the chains' business in dairy products and otherwise giving preferential treatment to the dairy petitioners (R. 8; see R. 10, 11).

[3] At the same time, the Commission also sought an order compelling the attendance of the individual petitioners, Adams, Sr., and Adams, Jr., at the hearing.

valid" because "they were not issued pursuant to lawful complaints" (R. 45). The asserted basis for this contention was that the complaints were "vague, indefinite and replete with conclusions of law which are wholly insufficient to inform respondents with reasonable definiteness of the charges which they are required to meet. Consequently, the complaints do not constitute lawful notice upon which proceedings before the Federal Trade Commission may be predicated * * *" (R. 45–46).[4] The court held that it did not have jurisdiction to determine the sufficiency of the complaints, because such jurisdiction "is vested solely in the Court of Appeals," but went on to state that assuming it possessed such jurisdiction, "the Complaint is adequate upon which to base the issuance of a subpoena, and to conduct the examinations incident to the investigation of the complaints against the various parties" (Pet. A14). However, "without questioning in any degree the right of the Commission to conduct its hearing or to proscribe or limit the extent thereof" (Pet. A16), the district court declined to enforce most of the specifications of the subpoenas because it found that the demands contained therein were either too broad or arbitrary or were not relevant to the charges made against petitioners (see Pet. A16–A20).

On cross-appeals from the order of the district court, the court of appeals, noting that the district

[4] The returns also made a broad attack on the scope of the subpoenas alleging, *inter alia*, that they "are invalid because they are unreasonably broad and do not specify as exactly as possible the material sought" (R. 46).

court had held that, if it had jurisdiction to pass upon the matter, it would have held the complaint sufficient (Pet. A27; n. 4), unanimously affirmed the district court's holding that it lacked jurisdiction to pass upon the sufficiency of the complaints (Pet. A30), it reversed the lower court's determination that the demands of the subpoenas were in large part unreasonable and therefore unenforceable (Pet. A41). With respect to its ruling on jurisdiction, the court emphasized that the determination merely prevents petitioners from prematurely curbing the Commission's proceedings (Pet. A28) and does not deny them their right to judicial review of the sufficiency of the complaints. "After this case has run the gamut of administrative proceedings and if an order is entered affecting [petitioners], they may * * * secure judicial review of any action taken by the Commission" (Pet. A29).

ARGUMENT

The decision below is correct and the petition presents no substantial question warranting review by this Court.

This Court's decisions in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, and *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, dispose of petitioners' contention that the district court had jurisdiction and

"[L]aying the specifications alongside the complaints" (Pet. A32), the court of appeals concluded upon analysis (Pet. A33-A41) that the demands were essentially reasonable; and after modifying certain specifications it directed the district court to "order enforcement of all of the subpoenas issued in the proceeding instituted by the Commission, in accordance with the determinations herein made" (Pet. A41).

was required to test the legal sufficiency of the Federal Trade Commission complaints in determining whether to enforce the subpoenas. In those cases agency actions for enforcement of administrative subpoenas were opposed on grounds similar to those upon which petitioners rely here: that the administrative investigations (no complaints had been issued) were in excess of the agency's statutory jurisdiction; that the subpoenas were in violation of rights guaranteed by the Fourth and Fifth Amendments to the Constitution; and that immediate determination of the issues was necessary to prevent irreparable harm which compliance with the subpoenas would entail. The Court rejected each contention, holding that the district courts, in absence of express statutory authorization, have no jurisdiction to determine, in the course of proceedings brought by the agency to enforce administrative subpoenas,[*] the legal validity of proposed agency actions.

If, as *Endicott Johnson* and *Oklahoma Press* hold, the district courts are without jurisdiction to test the legal validity of an administrative investigation challenged as beyond the agency's statutory authority, then *a fortiori* jurisdiction is lacking in this case where the Commission's jurisdiction to proceed is admitted,[†] where lengthy complaints have been issued

[*] The same rule applies in actions brought to enjoin agency proceedings (see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *McCauley* v. *Waterman S.S. Corp.*, 327 U.S. 540).

[†] Petitioners conceded in the court below that the Commission was authorized under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, to institute the proceedings against them (Pet. A26). See, *e.g.*, *Federal Trade Commission* v.

and where petitioners' sole challenge is that the complaints do not contain factual statements "sufficient to inform [petitioners] with reasonable definiteness of the acts and practices alleged to be in violation of the law" (R. 45).

The fact that *Endicott Johnson* and *Oklahoma Press* recognize that district courts may be called upon to determine the relevance of materials sought by administrative subpoena does not afford jurisdiction to test the validity of the underlying complaints—a jurisdiction which those very decisions expressly found lacking.[8] Petitioners' contentions to the contrary—that unless the court first resolves the validity of their claim that the complaints are fatally defective for failing to set out the particular activities alleged to constitute illegal restraints of trade, it cannot make the required findings as to relevancy (Pet. 8)—are based upon a complete misunderstanding of the holding of these cases and the permissible scope of agency subpoenas. Thus, in *Oklahoma Press* relevancy was determined with respect to the subject matter of the investigation—"whether petitioners were subject to the [Fair Labor Standards] Act and, if so, whether they were violating it" (327 U.S. at 210). The Commission's complaints (see the Statement, *supra*) attacked by petitioners as "vague, indefinite and replete with conclusions of law" provide a much more

Cement Institute, 333 U.S. 683 (conspiracy to fix prices violates Section 5 of the Federal Trade Commission Act).

[8] See *United States* v. *Morton Salt Co.*, 338 U.S. 632; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359 (C.A. 9); *Federal Trade Commission* v. *Crafts*, 355 U.S. 9, reversing *per curiam* 244 F. 2d 882 (C.A. 9).

detailed basis for determining relevancy than did those general statements of the objectives of the investigation found sufficient in *Oklahoma Press.*[8]

Contrary to the implications of petitioners' argument, the subpoena power of the Commission under Section 9 of the Federal Trade Commission Act is not so limited as to require the Commission to identify in its complaints each and every specific act and practice alleged to violate the law in order to support subpoenas necessary to develop that information for the subsequent prosecution of the case. Instead, Section 9 of the Federal Trade Commission Act expressly provides that the Commission shall have the power to require by subpoena "the production of all such documentary evidence relating to any matter under investigation."[9] This does not mean that the Commission has unlimited powers of inquest. But, as the court below correctly indicated (Pet. A30), the standards of relevance to be applied by the courts in en-

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[8] The Court stated in *Oklahoma Press*, *supra*, 327 U.S. at 208-209:

"* * * It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one."

[9] Even assuming *arguendo* (and contrary to the district court (Pet. A11)) that the complaints as written do not state a claim upon which relief can be granted, a cease and desist order based thereon would be valid if the Commission introduces sufficient evidence during the hearing to establish a violation of the Act and the respondents are given "actual notice and adequate opportunity to cure surprise" (*Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (C.A.D.C.); see *Armand Co.* v. *Federal Trade Commission*, 84 F. 2d 973 (C.A. 2), certiorari denied 299 U.S. 597; *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 349-350).

forcing administrative subpoenas are similar to those applicable in determining the scope of discovery proceedings under the Federal Rules of Civil Procedure. See *Oklahoma Press, supra*, 327 U.S. at 216; *Civil Aeronautics Board* v. *Hermann, supra*, 353 U.S. 322, 323, reversing 237 F. 2d 359 (C.A. 9). Accordingly, specification of the particular "acts and practices" alleged to constitute the offenses charged was not necessary in order to permit the courts to determine whether the particular demands of the subpoenas were (1) reasonably relevant to the charges in the complaint, (2) sufficiently definite and (3) not too broad.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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